

Serial: **138903**

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99027-SCT

***IN RE: MISSISSIPPI RULES OF
APPELLATE PROCEDURE***

ORDER

This matter is before the Court on the Motion to Amend Mississippi Rules of Appellate Procedure filed by the Hinds County Bar Association. The petitioner asks the Court to make editorial changes and typographical corrections to the Mississippi Rules of Appellate Procedure to promote clarity. After due consideration, the Court finds that the motion should be granted in part and denied in part. The Mississippi Rules of Appellate Procedure should be modified and corrected as set forth in **Exhibit A** to this order.

IT IS THEREFORE ORDERED that the Motion to Amend Mississippi Rules of Appellate Procedure filed by the Hinds County Bar Association is hereby granted in part and denied in part. The Mississippi Rules of Appellate Procedure are modified and corrected as set forth in **Exhibit A** to this order.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon the minutes of the Court and shall forward a true certified copy hereof to West Publishing

Company for publication as soon as practical in the advance sheets of *Southern Reporter, Second Series (Mississippi Edition)* and for publication in the *Mississippi Rules of Court*.

SO ORDERED, this the 18th day of April, 2007.

/s/ William L. Waller, Jr.

WILLIAM L. WALLER, JR., PRESIDING JUSTICE

EXHIBIT A

1. In the Comment to Miss. R. App. P. 2, in the last paragraph, the following sentence should be stricken.

~~Federal practice, by not permitting the suspension of comparable FED.R.APP.P. 4(a)(4), see *Acosta v. Louisiana Department of Health and Human Resources*, 478 U.S. 251, 106 S.Ct. 2876, 92 L.Ed.2d 192 (1986), creates an injustice which these rules are not intended to perpetuate. Also, because procedures for criminal appeals apply to post-conviction relief proceedings, MISS.CODE ANN. § 99-39-25(1); *Williams v. State*, 456 So.2d 1042, 1043 (Miss.1984), the Supreme Court may suspend the rules and extend the time for taking an appeal in those proceedings. Rules 2(c) and 4(g) thus supplant the procedure described in *Jones v. State*, 355 So.2d 89, 90 (Miss.1978).~~

2. In the Comment to Miss. R. App. P. 4, paragraph nine, the following sentence should be stricken and in paragraph eleven, a citation updated.

~~Rule 4(g) is based on Fed. R. App. P. 4(a)(5). Rule 4(g) has been drafted to cure ambiguities in the federal rule. A motion filed before expiration of the 30 day period may be *ex parte* and may be granted for any "good cause." This standard is identical to that found in Rule 26. The extension may not go beyond 30 days after the time prescribed in Rule 4(a).~~

...

On the other hand, a party misled by actions of the court can establish excusable neglect. See *Chipser v. Kohlmeyer & Co.*, 600 F. 2d 1061, 1063 (5th Cir. 1979); *In re Morrow*, 502 F. 2d 520, 522 (5th Cir. 1974) (dictum). Excusable neglect may be shown where a timely mailed notice was late because of unanticipated and uncontrollable delays in the mail. *Fallen v. United States*, 378 U.S. 139, 84 S. Ct. 1689, 12 L. Ed. 2d 760 (1964). See generally, 9 **20**W. Moore, *Federal Practice* 204.13[1-3] **§ 304-13**.

3. In the Comment to Miss. R. App. P. 9, the first sentence should read “judgment of conviction” rather than “judgment of convictions.”

Rule 9(a) is substantially patterned after Fed. R. App. P. 9(a). Subdivision (b) continues Mississippi practice for release after judgment of convictions provided in Unif. Crim. R. Cir. Ct. Prac. 7.02, Miss. Code Ann. §§ 99-35-105, -107, -109 (1994), Miss. Code Ann. § 99-35-115 (1994), Miss. Code Ann. § 99-35-117 (1994). Both 9(a) and (b) require the party seeking release to provide the appellate court with certain information relevant to release. See former 5th Cir. R. 9.1, 9.2. Normally these facts will be part of the record in the trial court. Both petitions under 9(a) and motions under 9(b) will be handled by the appropriate appellate court as motions under Rule 27.

4. In Miss. R. App. 17(h) and (i), the headings should be changed, as follows:

(h) Supplemental Briefs; Record on Review. Upon notice of a grant of *certiorari*, any party may, whether requested by the Court or not, within 10 days, file an original and 10 copies of a supplemental brief not to exceed 10 pages. No additional time or pages shall be allowed for supplemental briefs. The Supreme Court may require supplemental briefs on the merits of all or some of the issues for review. The Supreme Court's review on the grant of *certiorari* shall be conducted on the record and briefs previously filed in the Court of Appeals and on any supplemental briefs filed. The Supreme Court may limit the question on review.

(i) Oral Argument; Supplemental Briefs. Oral argument shall not be allowed, unless requested by the Supreme Court. The Court may require oral argument.

5. The Comment to Miss. R. App. P. 21, first paragraph, the second sentence should say the paragraph “was originally modeled on Fed. R. App. 21 as modified by the Fifth Circuit R. 21.”

Rule 21 applies to all requests for remedial writs under Miss. Code Ann. § 9-1-19 (Supp. 1994). Except for minor changes, it is identical to **The rule was originally modeled on** Fed. R. App. P. 21 as modified by 5th Cir. R. 21. With the exception of the writ of mandamus required by Rule 15, a party must seek relief in the trial court before obtaining the extraordinary relief of a remedial writ from the Supreme Court. The rule preserves the Mississippi requirement that papers attached to a petition must be certified. It does not require, however, that the petition be under oath. Petitions will be considered by a panel of the appropriate court rather than by a single justice or judge. In emergency circumstances in which panel consideration would be impractical due to requirements of time, however, a single justice or judge may hear the petition and issue a temporary stay pursuant to Rule 8. A single justice's or judge's decision not to grant a stay may be reviewed by the appropriate court.

6. At the end of the Comment to Miss. R. App. P. 22, in the bracketed text, the date “June 24, 199” should be changed to “June 24, 1999.” The comma after “January 1, 1999,” should be changed to a semi-colon and the comma before “July 27, 2000” should be deleted.

[Adopted to govern matters filed on or after January 1, 1995; amended effective January 1, 1999; **June 24, 1999**; amended effective, ~~July 27, 2000~~; amended effective February 10, 2005.]

7. In Miss. R. App. P. 27(b)(5), the words “for briefs” should be inserted between the word “limit” and the word “up.” Also, the words, “pages” should follow the numbers 75 and 125.

(b) Determination of Motions for Procedural Relief. Notwithstanding the provisions of Rule 27(a) as to motions generally, motions for procedural relief may be acted upon at any time without awaiting a response. When unopposed, motions for specified types of procedural orders may be disposed of by the clerk of the Supreme Court. The clerk may rule on motions:

- (1) for enlargement of time permitted by these rules for periods not to exceed a total of 60 days,
- (2) to make corrections in briefs or pleadings filed at the request of counsel filing the brief or pleading,
- (3) to withdraw as counsel and/or substitute appearance of counsel, except in appeals from the imposition of a sentence of death,
- (4) to voluntarily dismiss appeals where sought by the appellant or the cross-appellant, unless the case has been submitted to the Court for decision,
- (5) to increase the page limit **for briefs** up to 75 **pages**, or up to 125 **pages** in appeals from the imposition of a sentence of death,

...

8. In Miss. R. App. P. 28(e)(1), the phrase “From and after July 1, 1997” should be stricken. In 28(e)(2)(i), a citation example should be added.

(e) References in Briefs to the Record and Citations. All briefs shall be keyed by reference to page numbers (1) to the record excerpts filed pursuant to Rule 30 of these Rules, and (2) to the record itself.

(1) ~~From and after July 1, 1997,~~ **T**he Supreme Court and the Court of Appeals shall assign paragraph numbers to the paragraphs in all published opinions. The paragraph numbers shall begin at the first paragraph of the text of the majority opinion and shall continue sequentially throughout the majority opinion and any concurring or dissenting opinions in the order that the opinions are arranged by the Court.

- (2) All Mississippi cases shall be cited to either:

(i) the *Southern Reporter* and, in cases decided prior to 1967, the official Mississippi Reports (e.g., *Smith v. Jones*, 699 So.2d 100 (Miss. 1997); *Thompson v. Clark*, 251 Miss. 555, 170 So.2d 225 (1965)); or

...

9. In Miss. R. App. P. 28(g), the following should be added.

(g) Length of Briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the statement with respect to oral argument, any certificates of counsel, the table of contents, tables of citations, and any addendum containing statutes, rules, or regulations.

10. In Miss. R. App. P. 32(a) the phrase “font face” should be changed to “point type.” Also, the bracketed text at the end of the rule should not contain the word “provide.”

(a) Form of Briefs and Record Excerpts. Briefs and record excerpts may be produced by standard commercial printing or by any duplicating or copying process which produces a clear black image on white paper. The text in the body of briefs shall appear in at least 12 font face point type; the text of foot notes must appear in at least 11 font face point type.

...

[Amended effective May 27, 2004 to ~~provide~~ revise the size of fonts in the text of briefs.]

11. In Miss. R. App. P. 38, a portion of the first sentence of the rule and the last sentence of the Comment should be stricken, as follows:

In a civil case to which ~~Miss. Code Ann. § 11-3-23 (1991)~~ does not apply, if the Supreme Court or Court of Appeals shall determine that an appeal is frivolous, it shall award just damages and single or double costs to the appellee.

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 38 replaced Miss.Sup.Ct.R. 38, embracing proceedings in the Court of Appeals. 644-647 So.2d LXXVIII (West Miss.Cases 1994).

Comment

Unlike Fed.R.App.P. 38, this rule applies only to civil appeals, and does not apply to criminal cases. The rule applies when an appeal is frivolous. There is no requirement that the appeal have resulted in delay.

The damages to be awarded may include attorneys' fees and other expenses incurred by an appellee. Interest is treated separately and is governed by Rule 37.

~~This rule supplements and does not supplant the statutory 15% penalty now provided by Miss. Code Ann. § 11-3-23 (1991).~~

12. In APPENDIX I. FORMS, Form 1, the phrase “vs.” should be added.

APPENDIX I. FORMS

FORM 1

IN THE ___ COURT OF THE ___ JUDICIAL
DISTRICT OF ___ COUNTY, MISSISSIPPI

PLAINTIFF

VS.

NO. _____

DEFENDANT

NOTICE OF APPEAL

13. In APPENDIX I. FORMS, Form 5, in the signature lines at the bottom of the bracketed phrase [Guaranty or Surety Company] should be moved back toward the left margin and aligned under [Principal], as indicated below:

[Principal]

BY: s/ _____
[Principal or Attorney]

[Guaranty or Surety Company]

BY: s/ _____
Agent and Attorney-in-Fact
[Guaranty or Surety Company]
[Address]*

